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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 50

UNITED STATES OF AMERICA, *Petitioner,*

—v.—

DANIEL ANDREW SEEGER.

No. 51

UNITED STATES OF AMERICA, *Petitioner,*

—v.—

ARNO SASCHA JAKOBSON.

No. 29

FOREST BRITT PETER, *Petitioner,*

—v.—

UNITED STATES OF AMERICA.

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*

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Interest of *Amicus*

The American Civil Liberties Union submits this brief, with the consent of the parties, in support of affirmance in Nos. 50 and 51, and reversal in No. 29. The Union urges this result because it believes that Section 6(j) of the Uni-

versal Military Training and Service Act, 50 U. S. C. App. §456(j), violates both the Establishment and Free Exercise Clauses of the First Amendment. This brief is directed only to those constitutional issues.

Statement of the Cases

The facts of each case are set out in detail in the briefs of the parties. Concisely, Seeger and Jakobson, the respondents in Nos. 50 and 51, and Peter, the petitioner in No. 29, were convicted of having refused to submit to induction into the armed forces. Each of them had claimed exemption under Section 6(j) of the Universal Military Training and Service Act, 50 U. S. C. App. 456(j), which provides in pertinent part:

> Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code. * * *.

Seeger set forth his religious motivations[1] in his application for exemption as follows:

> "In a statement attached to the questionnaire, he explained his feeling that 'the existence of God cannot be

[1] The court below noted the concession by the United States that Seeger's objections to service were religiously based. 326 F. 2d at 847.

proven or disproven, and the essence of His nature cannot be determined. I prefer to admit this, and leave the question open rather than answer "yes" or "no." Seeger was anxious to explain, however, that 'skepticism or disbelief in the existence of God does not necessarily mean lack of faith in anything whatsoever * * * Such personages as Plato, Aristotle and Spinoza evolved comprehensive ethical systems of intellectual and moral integrity without belief in God, except in the remotest sense.' Finally, rejecting dependence upon his Creator for a guide to morality, Seeger asserted 'more respect for * * * belief in and devotion to goodness and virtue for their own sakes, and a religious faith in a purely ethical creed.'

"With obvious sincerity, Seeger articulately attempted further to expound the ethical position to which he felt driven by his conscience. 'It is our moral responsibility,' he wrote, 'to search for a way to maintain the recognition of the dignity and worth of the individual, the faith in reason, freedom, and individuality, and the opportunity to improve life for which democracy stands.' In language which underscored the ethical foundation of his faith, he decried 'the tremendous spiritual price that man pays for his willingness to resort to the mass destruction of human life to perpetuate his "ideals."' 'I cannot,' Seeger insisted, 'participate in actions which betray the cause of freedom and humanity. Experience with the past indicates that our armament policy will lead to war, and war, with its indiscriminate crushing of human personality, cannot preserve moral values * * * To resort to immoral means is not to preserve or vindicate moral values, but only to become collaborators in destroying all moral life among men.'" 326 F. 2d at 848-9.

The court below set forth Jakobson's religious views in this manner:

> "He begins by defining religion as the sum and essence of one's basic attitudes to the fundamental problems of human existence. He recognizes an ultimate cause or creator of all existence which he terms 'Godness.' In theory an individual's relationship to Godness can take one or the other of two forms, a 'vertical' relationship in which man relates directly to Godness, or a 'horizontal' one in which man relates to Godness indirectly by binding himself to the qualities of Godness that exist in every creation in Mankind and throughout the world. For himself Jakobson rejects the vertical 'one-to-one' relationship because God is unknowable to man, and because action and spiritual growth purportedly based on a direct relationship with Godness must thus lead to error since man can reason but imperfectly about the unfathomable. Moreover, he finds objectionable the egocentric two-dimensional view which the vertical relationship fosters. For him Godness can be approached only through psychic involvement in the three-dimensional world. Inward turning causes spiritual diminution, egocentricity, and passive 'putting up with' the evils of the world rather t. n an active attempt to change it. The way to arrive closer to Godness is by approaching the universals inherent in existence. The individual must deal directly with life, death, health, love, time—the 'givens' of existence stemming from the Ultimate Cause—as he finds them in himself and others." 325 F. 2d at 412-13.

Peter summarized his religious beliefs as follows:

> "Since human life is for me a final value, I consider it a violation of moral law to take human life. I think

I have reached this conviction out of my reading of such writings as those of Blake (christian mystic), Emerson, Whitman, and more modern poets who have touched on the question.

"I consider this belief to be superior to my obligation to the state.

"In so far as this conviction is religious, it has been best described by Rev. John Haynes Holmes as follows: 'Religion is the consciousness of some power manifest in nature which helps man in the ordering of his life in harmony with its demands * * * (it) is the supreme expression of human nature; it is man thinking his highest, feeling his deepest, and living his best.'

"I would say that the source of my conviction concerning the sacredness of human life and the human spirit has been my experience and study in our democratic american culture, with its values derived from the western religious and philosophical tradition. As I have indicated above, I feel that I have learned of the values of this tradition through personal reading and meditation rather than through experience in any organized groups." 324 F. 2d at 174 n. 2.

Seeger's and Jakobson's convictions were reversed. 326 F. 2d 846 (2nd Cir. 1964) and 325 F. 2d 409 (2nd Cir. 1963). Peter's conviction was affirmed. 324 F. 2d 173 (9th Cir. 1963).

ARGUMENT

POINT I

Section 6(j) is in violation of the Establishment Clause of the First Amendment.

The fatal defect of Section 6(j) is its attempt to define the type of "religious training and belief" which will qualify a conscientious objector for exemption from conscription. It prescribes and sanctions a distinct religion: that which, in the words of the statute, is founded upon "an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation. . . ." Since only this type of "religious training and belief" will qualify a conscientious objector for exemption, the statute creates a governmentally sanctioned form of religion and thus directly affronts the First Amendment.

Nearly two decades ago, this Court interpreted the Establishment Clause in the following manner:

> "Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of

> any religious organizations or groups and vice versa." *Everson* v. *Board of Education,* 330 U. S. 1, 15-16 (1947).

The conflict with the Establishment Clause in the case at bar is at least as great as that in *Engel* v. *Vitale,* 370 U. S. 421 (1962), and *School Dist.* v. *Schempp,* 374 U. S. 203 (1963). Indeed, the religious character of Section 6(j) is more clearly evident than the school prayers and Bible reading involved in *Schempp* where the religious character of those activities had to be interpreted from their nature, purpose and history. 374 U. S. at 223-24. Here, the religious character of the conscientious objector exemption is plain on the face of the statute.

The Supreme Being definition of Section 6(j) should be compared with the religious qualification for notaries public condemned in *Torcaso* v. *Watkins,* 367 U. S. 488 (1961). The Court's statement in that case is equally applicable to the facts of the present case: "The power and authority of the [United States] thus is put on the side of one particular sort of believers—those who are willing to say they believe in [a Supreme Being]." 367 U. S. at 490. Like *Torcaso,* Section 6(j) as applied to Seeger, Jakobson or Peter, "force[s] him to profess a belief or disbelief in any religion." *Everson* v. *Board of Education, supra,* at 15; *Torcaso* v. *Watkins, supra,* at 495. It compels a conscientious objector to profess a belief in a religion which involves a "belief in a relation to a Supreme Being."

Another vice of the *Torcaso* statute was that it "aid[ed] all religions as against non-believers" and "aid[ed] those religions based on a belief in the existence of God as against those religions founded on different beliefs." 367 U. S. at 495. Section 6(j) aids religion in general as against non-believers, but more particularly it aids religions based upon

a belief in a Supreme Being as against other religions having different beliefs.

The fact that the definition of religion contained in Section 6(j) purports to be denominationally neutral is irrelevant in an Establishment case. *Engel* v. *Vitale, supra,* at 430. Again, the fact that the statute may not directly coerce the practice of an individual's religious beliefs is not a consideration in an Establishment case. *School Dist.* v. *Schempp, supra,* at 223. The reason that the presence or absence of coercion, like the non-denominational character of the activity, is not taken into consideration in an Establishment case is that in such cases the inquiry is to governmental action, not its effect on the individual.

The interdiction of the Establishment Clause is intended to keep government out of religion, to maintain that "wall of separation" between church and state of which Jefferson wrote. As this Court said of the Establishment Clause in *Engel* v. *Vitale,* "Its first and most immediate purpose rested on the belief that a union of government and religion tends to destroy government and to degrade religion." 370 U. S. at 431. The vice of the statute involved here is that it places the Federal government's imprimatur on those religions which believe in the existence of a Supreme Being to the exclusion of those which do not.

Nor can it be claimed that the statute has independent secular justifications such as the Sunday laws sustained in *McGowan* v. *Maryland,* 366 U. S. 420 (1960), or the monogamy laws sustained in *Davis* v. *Beason,* 133 U. S. 333 (1890) and *Reynolds* v. *United States,* 98 U. S. 145 (1879). Here there can be no conclusion "that the general welfare of society, quite apart from any religious considerations, demands such regulation." *McGowan* v. *Maryland, supra,* at 442. The religious nature of Section 6(j) is not an

indirect by-product of legislation designed to achieve another public end. Rather, its direct and sole effect is to aid religion.

POINT II

Section 6(j) is in violation of the Free Exercise Clause of the First Amendment.

Quite apart from the invalidity of Section 6(j) under the Establishment Clause, it also violates the Free Exercise Clause. As demonstrated by the Second Circuit in its opinion in *Seeger*, the statutory requirement of belief in a Supreme Being "cannot embrace all those faiths which can validly claim to be called 'religious' ". 326 F. 2d at 852-3. See also *Torcaso* v. *Watkins, supra,* at 495 n. 11. Since by its very terms Section 6(j) excludes those who do not profess a belief in a "relation to a Supreme Being," it penalizes such individuals because of their religious beliefs.

It is no answer to argue that exemption from military service is a matter of legislative grace. Only recently this Court has held that government may not grant a benefit upon conditions which force the recipient to violate his religious beliefs. *Sherbert* v. *Verner*, 374 U. S. 398 (1963). There the Court said:

> "The ruling forces [appellant] to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship." At 404.

Furthermore, it cannot be argued that the conscientious objection exemption is a "privilege" and not a "right". As the Court said in rejecting this argument in *Sherbert*:

> "It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege . . . [T]o condition the availability of benefits upon this appellant's willingness to violate a cardinal principle of her religious faith effectively penalizes the free exercise of her constitutional liberties." 374 U. S. at 404, 406.

See also *Speiser* v. *Randall*, 357 U. S. 513, 518-19 (1958).

The statute's Supreme Being test is similar in its effect to the religious tests and oaths condemned in a long series of decisions of this Court. See, e.g., *Torcaso* v. *Watkins*, *supra*; *Girouard* v. *United States*, 328 U. S. 61 (1946); *Schneiderman* v. *United States*, 320 U. S. 118 (1943); *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624 (1943). The religious test in the instant cases operates with the certain effect of restricting the freedom of nontheistic and polytheistic conscientious objectors. As this Court stated in *Girouard* v. *United States*, *supra*, at 68:

> "The struggle for religious liberty has through the centuries been an effort to accommodate the demands of the State to the conscience of the individual. The victory for freedom of thought recorded in our Bill of Rights recognizes that in the domain of conscience there is a moral power higher than the State. Throughout the ages men have suffered death rather than subordinate their allegiance to God to the authority of the State. Freedom of religion guaranteed by the First Amendment is the product of that struggle."

CONCLUSION

It may well be argued that reading the statutory exemption to include non-theistic and polytheistic conscientious objectors would operate as an establishment of religion, even as thus broadly construed. The short answer to such a contention is that the choice of language contained in the statute at bar is that of Congress and not of the Court. So long as Congress has seen fit to confine the conscientious objector exemption to religious grounds, it is the duty of the Court to construe and apply it consistently with the principles of the First Amendment. It will be time enough to consider the constitutionality of confining the exemption to religious grounds when the statute is attacked for that reason. Having granted the exemption, however, Congress is precluded by the First Amendment from attempting to limit the type of religious beliefs which may qualify, or from restricting it to those who come within the definition. For even if it be assumed that Congress has valid reasons for granting exemption only to religious conscientious objectors, it does not follow that government may put itself in the business of defining that religion and testing an individual's beliefs against the definition.

It is no answer to state that there must be some definition of religion in order to ascertain the bona fides of the religious beliefs of one claiming conscientious objector status. Religious beliefs have always been a matter of individual conscience. Government cannot test their validity. *United States* v. *Ballard*, 322 U. S. 78 (1944). In the final analysis, this must rest upon the good faith of the individual who, under our tradition of religious liberty, must be allowed to define his own religious beliefs. Any statute or regulation which authorizes government to test the validity of an individual's beliefs violates these fundamental

principles. It is for these reasons that Section 6(j) must fall. Its Supreme Being test is in effect an Establishment by Congress of a monotheistic religion. Moreover, its limitation only to those who meet the Supreme Being test is a burden on the free exercise of those who believe in non-theistic and polytheistic religions.

For the reasons stated above, the decisions below in Nos. 50 and 51 should be affirmed, and the decision in No. 29 should be reversed.

Respectfully submitted,

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